Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979

No. 79-1323

WILLIAM ANTONIO QUINONES a/k/a CHENGO
a/k/a WILLIE and CANDIDA FIGUEROA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

CHARLES B. BURR, II,
Attorney for Petitioners,
William Antonio Quinones
and Candida Figueroa.

Of Counsel:
GRIFFITH & BURR, P. C.,
Suite 200, 800 Chestnut Street,
Philadelphia, Pennsylvania. 19107
(215) 923-1900

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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I.

To Protect Petitioners' Sixth Amendment Right to Retain Counsel of Their Choice and to Guarantee the Orderly Administration of Justice This Court Must Establish Uniform Criteria for the Determination of a "Knowing and Intelligent" Waiver in the Context of Relinquishing Conflict-Free Representation Prior to Trial.

The United States, in its opposing Brief in No. 79-1323, clings tenaciously to its repeated reluctance to accept this Court's premise in *Holloway v. Arkansas,* 435 U. S. 475 (1978) that a defendant may waive his right to assistance of counsel who is free from any conflict of interest. The decisions below, both of the United States District Court for the Eastern District of Pennsylvania and of the United States Court of Appeals for the Third Circuit affirming the District Court, ignore the Third Circuit's own rule, as set forth in *United States ex rel. Hart v. Davenport,* 478 F. 2d 203 (3rd Cir. 1973) which recognizes that the right to effective assistance of counsel may be waived provided the dangers of joint representation are explained, as they were in this case, to the defendants at the earliest possible time in the proceedings. *Id.* at 210-211. *Cf., Sullivan v. Cuyler,* 593 F. 2d 512 (3rd Cir.), *cert. granted,* 100 S. Ct. 44, 48 U. S. L. W. 3217 (No. 78-1832) (1979) (raising Sixth Amendment issues concerning the right to effective counsel in conflict of interest situations in the post-trial context).

In the instant case the trial judge, not satisfied by counsel's assurances alone, conducted a thorough examination of each Petitioner on the record in which he explained, inter alia, the seriousness of the charges, the possibility at trial that the best protection of the interest of one defendant may be different from the protection of the interests of

the other defendant who is represented by the same counsel, and the right of each defendant to separate counsel. Both defendants were required to address the court personally, assured the trial court that they understood what was being said, and unequivocally reaffirmed their desire to remain with present counsel (Pet. App. A3-A10; A12-A15). In addition, both Petitioners signed, with the advice and in the presence of Puerto Rican counsel, a letter acknowledging the possibility of a conflict of interest but nevertheless requesting representation by the same counsel (Pet. App. A10-A12; A22). Despite the trial court's sensitivity to the theoretical possibility of a conflict of interest, despite the trial court's searching inquiry by careful and explicit questioning, and despite the unconditional nature of Petitioners' choice to be represented jointly, the trial court concluded, without articulating reasons or making adequate findings, that Petitioners could not make a knowing and intelligent waiver of their Sixth Amendment right to effective assistance of counsel. This conclusion, in addition to being contrary to the law in the Third Circuit and conflicting with decisions in other circuits, is self-serving, arbitrary and not supported in the record.

Petitioners are dismayed that a United States District Judge, as here, can so broadly read the concerns of the United States Court of Appeals for the Third Circuit in *United States v. Dolan*, 570 F. 2d 1177 (3rd Cir. 1978) as to make it quite literally impossible for them to prove an understanding and waiver of their Sixth Amendment rights in a way which will gain them what they most earnestly need and have conscientiously chosen: joint representation. Such representation cannot be shown, other than by the most unreasonably imaginative conjecture, to be an "insoluble stress" at trial. To say, on the facts of this case, that Petitioners have not waived their Sixth Amendment rights, knowingly and intelligently, by "clear, unequivocal

and unambiguous language" [*United States v. Garcia*, 517 F. 2d 272, 278 (5th Cir. 1975)], is implicitly and effectively to rewrite the Constitution and establish a *per se* rule which, despite Petitioners' expressed preference to retain counsel of their choice and an expressed willingness to relinquish their right to conflict-free representation, disqualifies counsel under all circumstances from representing more than one defendant in a criminal case.

To protect Petitioners' Sixth Amendment right to retain counsel of their choice and to guarantee the orderly administration of justice this Court must fashion uniform criteria for the determination of a "knowing and intelligent" waiver in the context of relinquishing conflict-free representation prior to trial. An instructive model has been provided by the Fifth Circuit in the case of *Zuck v. Alabama*, 588 F. 2d 436, *cert. denied*, 100 S. Ct. 63 (1979). In that case the court set forth criteria to be used, analogous to Rule 11 requirements imposed on trial courts before accepting a guilty plea, in determining whether a defendant has made a valid waiver. According to *Zuck*, the Government is required to show only that the defendant (1) is aware of the conflict, (2) realizes the consequences that may result from such a conflict, and (3) is aware of his right to separate representation. *Id.* at 440.

The first and third *Zuck* criteria are easily satisfied. The second criterion—that a defendant realize the consequences which may result from a conflict—poses a more subtle situation. Nevertheless, at least one thoughtful commentator has suggested that satisfaction of this criterion may be obtained by an *in camera* conference during which

> ". . . the judge would ask the defendants or counsel to explain, first, why the defendants and counsel wanted joint representation; second, whether a conflict existed or was anticipated; third, how counsel intended to prevent any conflict; fourth, what the de-

> fense would be and the evidence to establish it; fifth, the substance of every conversation between counsel and the defendants regarding these matters; and sixth, any other matters the court thought might help the defendants make an informed decision. Defendants would be expected to waive the attorney-client privilege and personally disclose or permit counsel to disclose that information. Defendants would be expected to affirm or to comment upon counsel's statements. If defendants refuse to provide this information personally or through counsel, they would be denied joint representation. If they give this information, their waiver of the right to conflict-free representation will be as informed, intelligent, and binding as possible." Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1118-1120 (1979).

The approach suggested in the above quotation was implicitly adopted by the Third Circuit in *United States v. Laura*, 607 F. 2d 52 (1979) but unfortunately, and to the prejudice of Petitioners, the lesson of *Laura* was ignored by the trial court.

II.

CONCLUSION.

The importance and substantiality of the questions presented have not been denied. The United States wholly misapprehends the requirements of the Sixth Amendment to the Constitution in this case. In light of the inability of the Government in its Brief to analyze critically the issues presented in the Petition the need for plenary review of the action below is indisputable; indeed, Petitioners suggest that summary reversal is now in order.

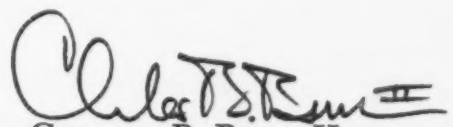
Respectfully submitted,

CHARLES B. BURR, II,
Attorney for Petitioners,
William Antonio Quinones and
Candida Figueroa.

Of Counsel:
GRIFFITH & BURR, P. C.,
Suite 200, 800 Chestnut Street,
Philadelphia, Pennsylvania. 19107
(215) 923-1900

CERTIFICATE OF SERVICE.

I hereby certify that on the 6th day of May, 1980, pursuant to Rule 33(2)(a), three (3) copies of the within Petitioners' Reply to Brief For the United States In Opposition were deposited in a United States mail box with first class postage prepaid addressed to the only party herein to be served: Solicitor General, Department of Justice, Washington, D. C. 20530.



CHARLES B. BURR, II,
Attorney for Petitioners,
William Antonio Quinones and
Candida Figueroa.